1999

Salt Lake City, Plaintiff/Appellee, vs. David Woitock, Defendant/Appellant : Brief of Appellee

Utah Court of Appeals

T. Langdon Fisher; Salt Lake City Prosecutor; Attorney for Plaintiff/Appellee.
Andrea J. Garland; Salt Lake Legal Defender Association; Attorney for Defendant/Appellant.

IN THE UTAH COURT OF APPEALS

990226

SALT LAKE CITY, Plaintiff/Appellee, vs. DAVID WOITOCK Defendant/Appellant.	**APPELLEE'S BRIEF** **Case No. 990226-CA** Priority No. 2

BRIEF OF THE APPELLEE

Appeal from a conviction and judgment of Battery, a class B misdemeanor, in the Third District Court, Salt Lake Department, State of Utah, the Honorable Sheila K. McCleve, Judge, presiding.

T. LANGDON FISHER (SB # 5694)
Associate City Prosecutor
Attorney for Plaintiff/Appellee
Salt Lake City Prosecutor's Office
451 South 200 East, Fourth Floor
Salt Lake City, Utah 84111
(801) 535-7767

ANDREA J. GARLAND (SB # 7205)
Attorney for Appellant/Appellant
Salt Lake Legal Defender Association
424 East 500 South, Suite 100
Salt Lake City, Utah 84111
(801) 532-5444

IN THE UTAH COURT OF APPEALS

SALT LAKE CITY, Plaintiff/Appellee, vs. DAVID WOITOCK Defendant/Appellant.	**APPELLEE'S BRIEF** **Case No. 990226-CA** Priority No. 2

BRIEF OF THE APPELLEE

Appeal from a conviction and judgment of Battery, a class B misdemeanor, in the Third District Court, Salt Lake Department, State of Utah, the Honorable Sheila K. McCleve, Judge, presiding.

T. LANGDON FISHER (SB # 5694)
Associate City Prosecutor
Attorney for Plaintiff/Appellee
Salt Lake City Prosecutor's Office
451 South 200 East, Fourth Floor
Salt Lake City, Utah 84111
(801) 535-7767

ANDREA J. GARLAND (SB # 7205)
Attorney for Appellant/Appellant
Salt Lake Legal Defender Association
424 East 500 South, Suite 100
Salt Lake City, Utah 84111
(801) 532-5444

Table of Contents

Table of Authorities

Cases

Rules

IN THE UTAH COURT OF APPEALS

SALT LAKE CITY, Plaintiff/Appellee, vs. DAVID WOITOCK Defendant/Appellant.	**APPELLEE'S BRIEF** **Case No. 990226-CA** Priority No. 2

BRIEF OF THE APPELLEE

Appeal from a conviction and judgment of Battery, a class B misdemeanor, in the Third District Court, Salt Lake Department, State of Utah, the Honorable Sheila K. McCleve, Judge, presiding.

T. LANGDON FISHER (SB # 5694)
Associate City Prosecutor
Attorney for Plaintiff/Appellee
Salt Lake City Prosecutor's Office
451 South 200 East, Fourth Floor
Salt Lake City, Utah 84111
(801) 535-7767

ANDREA J. GARLAND (SB # 7205)
Attorney for Appellant/Appellant
Salt Lake Legal Defender Association
424 East 500 South, Suite 100
Salt Lake City, Utah 84111
(801) 532-5444

STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction in this matter pursuant Utah Code Ann. § 78-2a-3 (1996). Defendant/Appellant has not demonstrated that appellate jurisdiction in the Court of Appeals applies to matters involving the Americans with Disabilities Act.

STANDARDS OF REVIEW

Issues of relevancy are reviewed under an abuse of discretion standard. *State v. Blubaugh*, 904 P.2d 688 (Utah Ct. App. 1995). Issues of law are reviewed under a correctness standard, without deference to the trial court. *Meadowbrook, LLC v. Flower*, 959 P.2d 115 (Utah 1998).

STATEMENT OF FACTS

Plaintiff/Appellee takes issue with the Statement of Facts in the Brief of Appellant. Defendant/Appellant certainly has the option of portraying underlying "facts" in a light most favorable to his appeal. Such a tactic, when ethically pursued, means to select testimony or other evidence of record that reflects favorably on one's position. It does not mean to mislead by turns of phrase. For example, in the Statement of Facts in the Brief of Appellant, misleading, prejudicial language is employed in an attempt to paint the victim and witnesses out to be young hoodlums looking for trouble. In paragraph number 8 of Appellant's Statement of Facts, (Br. of Appellant at 5), Appellant claims that "Alex Headman and his two friends left West High School to throw rocks at the Horace Mann Junior High annex building." Brief of Appellant, hereinafter "Br. of Appellant," at 5, ¶ 8.

There is not even any subtlety to the misleading nature of this statement (particularly when couched following Appellant's list of "facts" concerning Mr. Woitock's complaints about previous problems in the neighborhood). Appellant is stating that these young men left school without permission, essentially "cutting class," with the purpose of doing vandalism. To the contrary, the record indicates that the victim and his two friends left class because their school day was over. Jury Trial Transcript, hereinafter "Tr.," at 13, ll. 4–13. Furthermore, nothing in the record indicates that the three have ever been in trouble in or out of school; it does reflect that they are involved in legitimate activities of law-abiding young teens. Tr. at 12, ll. 18–21; 37, ll. 1–2.

Plaintiff/Appellee's rendition of facts follows:

1. On March 16, 1998, Alex Headman, a 14-year-old student in the ninth grade at West High School in Salt Lake City, (Tr. at 12, ll. 12–15), left school with two classmates at the end of their school day (Tr. at 13, ll. 4–15). The friends were Adam Saxton and Josh Hight. (Tr. at 13, ll. 16–17.) The three boys planned to stop at the mall for something to eat on their way home. (Tr. at 13, ll. 19–20.)
2. Across the street from school, Alex, Adam, and Josh passed the Horace Mann Junior High School annex (hereinafter, "the annex"). Tr. at 14, ll. 12–24. At that time, demolition had already commenced on the annex building, and many of the windows had already been broken. Tr. at 15, ll. 1–7.
3. After observing some other school kids ahead of them doing the same thing, the boys decided to throw rocks at the semi-demolished building to try to break glass in

the remaining windows. Tr. at 15, l. 23, to 16, l. 16. They proceeded to do so, using rocks and gravel they found on the ground, and on or about the driveway of an apartment house across an alleyway from the annex. Tr. at 17, ll. 1–11; 19, l. 4; 38, ll. 1–11; 38, ll. 22–23.

4. A man began to yell at the boys, using obscenities and telling them to stop throwing rocks. Tr. at 19, ll. 11–25; 39, ll. 12–19. The man was David Woitock (Defendant/Appellant). Tr. at 22, ll. 1–6. Woitock came outside and confronted the boys. Tr. at 38, l. 25 through 39, l. 6.

5. Woitock held a cane midway down the staff and waived it in the air when he approached the boys. Tr. at 22, ll. 13–14. Woitock asked them, "Who should I cane first?" Tr. at 39, ll. 4–5. The boys started to leave, but Woitock followed. Tr. at 39, ll. 17–19.

6. Alex Headman had dropped his rocks, and was walking away with his back turned to Woitock, (Tr. at 20, l. 24–26), when Woitock hit Headman on the back of the head. Tr. at 22, ll. 22–23; 40, ll. 9–25. The force of the blow was sufficient to cause Alex to suffer blurred vision, nausea, and dizziness. Tr. at 22, l. 25; 23, l. 24. His two friends helped him to walk, with difficulty, back to the school, where the matter was reported to Officer Steven Olson of the Salt Lake City Police Department. Tr. at 23, l. 14, to 24, l. 17.

7. Officer Olsen was familiar with Woitock from previous encounters. Tr. at 43, ll. 16–17. Officer Olsen made contact with Woitock and asked him about the incident. Tr.

at 45, l. 9, to 47, l. 4. Woitock denied having a cane and claimed he no longer possessed it. Tr. at 46, l. 8. Woitock claimed he knew nothing of the incident involving Alex Headman. Tr. at 47, ll. 5–6. When Officer Olsen pressed the subject, Woitock admitted to having hit one of the boys because he believed they were releasing asbestos from the partially demolished annex. Tr. at 47, ll. 8–25.

8. Officer Olsen issued a misdemeanor to Woitock for hitting Alex Headman. Tr. at 48, l. 9.

SUMMARY OF THE ARGUMENT

I. DEFENDANT/APPELLANT'S ARGUMENTS ARE INADEQUATELY BRIEFED

Appellant's[1] brief is inadequately briefed in that the arguments presented in both Point I and in Point II do not comply with Rule 24(a)(9) and 24(e) of the Utah Rules of Appellate Procedure. The argument sections of the Brief of Appellant do not provide appropriate citations to the record to put Appellee on notice as to what evidence was allegedly excluded or how the issues were preserved. No case law or legal analysis is provided as to Point I, and the case law that is cited without analysis in Point II is insufficient. The burden of filling in the gaps in Appellant's arguments has been left to Appellee and this Court.

[1] Although Rule 24(d) of the Utah Rules of Appellate Procedure dictates that use of terms such as "appellee" and "appellant" should be kept to a minimum, the priority intimated by the rule is clarity. Therefore, since the terms "Appellant" and "Appellee" were exclusively used in the Brief of Appellant, for the sake of clarity that practice is continued here.

II. THE ISSUES PRESENTED FOR APPEAL WERE NOT PRESERVED AT THE TRIAL COURT LEVEL

Due to the inadequacy of the Brief of Appellant, Appellee has had to make assumptions about the record as to where and how evidence was excluded. Appellee has proceeded based on those assumptions. With respect to Point I of the Brief of Appellant, Appellant did not preserve the issue, making no proffer as to the anticipated testimony, and offering only the most sweeping comment as to its relevance to the facts at issue in trial. As to Point II of the Brief of Appellant, a brief, unsupported suggestion about a sentencing alternative does not act as an evidentiary proffer, as claimed by Appellant. Furthermore, the trial judge's final sentence went unchallenged. The issue was not preserved.

III. ARGUMENTS SPECIFIC TO DEFENDANT/APPELLANT'S POINT I

Appellant laid no foundation to establish the relevance, if any, of the theory of community-based policing to the case at hand. Likewise, little or no foundation was laid to establish the relevance of a police officer's advice to an uninvolved, nonwitness neighbor as to neighborhood problems. If any connection existed between excluded testimony and the facts at issue in the trial, the nexus was so abstract that a determination of irrelevance would certainly fall within the trial judge's broad discretion.

IV. ARGUMENTS SPECIFIC TO DEFENDANT/APPELLANT'S POINT II

The Americans with Disabilities Act provides civil remedies to people who believe they have been the subject of discrimination by public entities. It does not provide that a person with disabilities cannot be sentenced to jail. In any event, the trial judge had not been provided with sufficient evidence to require an alternative sentence, wherever any such mandate might reside.

ARGUMENT

I. DEFENDANT/APPELLANT'S ARGUMENTS ARE INADEQUATELY BRIEFED

The argument section in the Brief of Appellant is inadequate with respect to the issues raised in both "Point I" and "Point II."

> The argument [section of an appellate brief] shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on.

Utah R. App. P. 24(a)(9). Due to the inadequacy of the Appellant's briefing, the issues before the court are too broad and too vague to merit further review or oral argument.

Defendant/Appellant's "Point I" is inadequately briefed

Appellant's Point I argument, (Br. of Appellant at 9–10), is cursory at best with respect to the "contentions and reasons" behind it. Utah R. App. P. 24(a)(9). Essentially, the argument consists of several general conclusions without any legal analysis for either Appellee or this Court to rebut or follow. Appellant asserts flatly that certain evidence—

evidence never specifically described—"was relevant" and "would have supported his contention … ." Br. of Appellant at 10. It is then left to Appellee to provide both the analysis and the reply. Such a task is all the more burdensome because Appellant's contention seems to be based in a defense that was never raised at trial. "Appellant was justified in using force against Mr. Headman because he reasonably believed that force was necessary to defend himself from Mr. Headman's use of unlawful force." Br. of Appellant at 9. No evidence was offered at trial to indicate any use of force (intimated, let alone imminent) by the 14-year-old victim, Alex Headman. Even Appellant testified that Alex was "walking away" at the time of the offense. Tr. at 68, ll. 19–20.

Appellant has also inadequately briefed the grounds for reviewing issues that were not preserved at trial. In this brief, (*infra*, part II), Appellee contends that the issue raised by Appellant's Point I was not preserved at the trial court level. Appellant will undoubtedly dispute this contention. However, Appellant fails to address the matter of preservation of issues at *any* point. Of course, that would have required specific citations to the record, which are also noticeably lacking.

Nowhere in his Point I argument does Appellant cite the record in order to provide direction on the point at issue. "If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the record at which the evidence was identified, offered, and received or rejected." Utah R. App. P. 24(e). The first sentence of Appellant's Point I argument begins, "The evidence that appellant attempted to introduce at trial … ." Br. of Appellant at 9. The second sentence begins,

"The evidence that appellant sought to introduce at trial … ." (Br. of Appellant at 9.) But *what* evidence? The only citation to the record,[2] which covers approximately 25 pages of the Jury Trial Transcript, consists only of testimony that was admitted without objection. For the most part, this lengthy citation consists of the testimony of four prosecution witnesses. ("Transcript, p. 20, l. 23 through p. 53, l. 12[.]" Br. of Appellant at 10.) The citation also includes excerpted testimony of a defense witness who had not been present when the incident occurred and had no personal knowledge about the incident. ("Transcript, … p. 59, l. 22 through p. 60, l. 17[.]" Br. of Appellant at 10.) Finally, the same citation covers Appellant's own testimony concerning the problem of vandalism in the general vicinity and testimony concerning a previous unrelated assault on Appellant by people in no way associated with the victim or witnesses of this case. ("Transcript, … p. 63, l. 2 – 20[.]" Br. of Appellant at 10.) None of this cited testimony drew an objection or was otherwise excluded. Appellee and this Court are, evidently, expected to sift through the 102 pages of transcript and speculate on which parts of the record establish an appealable issue and which parts might be relevant to Appellant's position.

Not only does Appellant's Point I argument lack any relevant reference to the record, it also lacks adequate "citations to the authorities [and] statutes" relied on. Utah R. App. P. 24(a)(9). The statutory citations are to Rule 401 of the Utah Rules of Evidence, quoted in full, and a referral to section 76-2-402(1) of the Utah Code, the statutory

---

[2] "(Transcript, p. 20, l. 23 through p. 53, l. 12, p. 59, l. 22 through p. 60, l. 17; p. 63, ll. 2 – 20)" (Br. of Appellant at 10.)

definition of justifiable force. No authority is supplied to show how either of these provisions apply to the issue of Point I. No case law or analysis explains how "current police philosophy[,]" (Br. of Appellant at 9), would make any fact of consequence more or less probable. No authority or analysis explains Appellant's intimation that this evidence is somehow connected to, or would somehow alter, the law of justification. Again, Appellee and this Court are evidently expected to research and develop Appellant's suggested arguments.

Such expectations are not permissible. "It is well settled that a reviewing court will not address arguments that are not adequately briefed." *State of Utah v. Jacoby*, 363 Utah Adv. Rep. 23, 25 (Utah Ct. App. 1999). The Utah Supreme Court has repeatedly clarified this principle, as seen in these recent remarks:

> We have made clear that this court is not "'a depository in which the appealing party may dump the burden of argument and research.'" *State v. Bishop,* 753 P.2d 439, 450 (Utah 1988) (quoting *Williamson v. Opsahl,* 92 Ill. App. 3d 1087, 416 N.E.2d 783, 784, 48 Ill. Dec. 510 (Ill. 1981)). We further clarified the requirements of rule 24(a)(9) in the recent case of *State v. Thomas,* 961 P.2d 299 (Utah 1998), where we stated that rule 24(a)(9) "implicitly . . . requires not just bald citation to authority but development of that authority and reasoned analysis based on that authority." *Id.* at 305.

State v. Jaeger, 360 Utah Adv. Rep. 3, 6 (Utah 1999). *See also*, *Burns v. Summerhays*, 927 P.2d 197 (Utah Ct. App. 1996), *State ex rel C.Y v. Yates*, 834 P.2d 69 (Utah Ct. App. 1992).

In *Jaeger,* the appellant cited "relevant constitutional provisions" and case law, but "his brief otherwise lacked any meaningful analysis of this authority." *Id.* The Court therefore declined to consider his constitutional arguments. As to Appellant's Point I in the present case, however, the Brief of Appellant more closely parallels the situation in *Jacoby,* where (as to one issue) the "brief contain[ed] *no* legal analysis or authority..." *Jacoby*, at 25 (emphasis added).

Defendant/Appellant's "Point II" is inadequately briefed

The same inadequacies apply to Appellant's "Point II." Br. of Appellant, pp. 10–13. Appellant presents no legal basis for the suggestion that the Americans with Disabilities Act (hereinafter, "the ADA") should have controlled the judge's sentence, or how a jail's alleged noncompliance with the ADA should be addressed through an appeal of a state criminal court sentence. The undeveloped assertion that the ADA controls here is the kind of "bald citation to authority" that *Jaeger* and its precursors have found unacceptable. *Jaeger*, 360 Utah Adv. Rep. At 6. Appellant presents no authority for the proposition that the trial judge's "[s]uggest[ion] that Mr. Woitock's counsel simply find a 'more suitable' jail (Sentencing Transcript, p. 4, l. 19 – p. 5, l. 2) violated Mr. Woitock's rights under the Act." Br. of Appellant at 12. More importantly here, Appellant provides no authority for how such an alleged violation of "rights under the Act" would provide grounds for an appellate court to amend a trial court's sentence.

Appellant does provide case law in his Point II argument, but it is limited to determinations of the ADA's applicability to correctional facilities. Again, the "burden of

argument and research" has been left to Appellee and this Court. *Jaeger*, 360 Utah Adv. Rep. at 6. The ADA is a large and complex piece of federal legislation, which has spawned an equally large and complex body of federal case law. Appellant evidently had high expectations for the Appellee to canvass this body of law and fashion an argument in Appellant's favor.

In lieu of citations to the record, Appellant primarily cites his own Statement of Facts for "support" of his contentions. (As indicated on pp. 2–3, *supra*, Appellee takes issue with the Statement of Facts found in the Brief of Appellant.) Also, as with Appellant's Point I, no citations to the record are provided in Point II to indicate how this issue was preserved. As discussed in part II of this brief, this last omission is certainly due to the fact that the issue was not preserved.

II. THE ISSUES PRESENTED FOR APPEAL WERE NOT PRESERVED AT THE TRIAL COURT LEVEL

Point I was not preserved through a proffer of the evidence

As addressed in part I, *supra*, Appellant's brief provides no specific citations to the record to indicate where or how the issue of the "level of police protection" was preserved. Br. of Appellant at 9. It is left to Appellee to review the transcript and try to determine at what point desired testimony was excluded, and then to search for possible points of preservation of the broad issue raised by Appellant. Appellee proceeds here, therefore, with the caveat that the segments of the record that might apply to this appeal

were not cited in the Brief of Appellant, and therefore these issues were not adequately briefed.[3]

During Appellant's cross-examination of a prosecution witness (Officer Steven Olsen), in a section of the transcript not cited in Appellant's brief, Appellant attempted to expand cross-examination beyond the scope of direct examination by raising the issue of "community based policing." Tr. at 53, ll. 20-21. The prosecutor objected on the grounds of relevance. Appellant's counsel responded, "It goes to his credentials, your honor." Tr. at 54, l. 10. The trial judge overruled the prosecutor's objection, and Appellant was allowed to proceed with the line of questioning. Tr. at 54, ll. 7–12. After two subsequent defense questions about community-based policing, the prosecutor again objected, this time asserting a lack of foundation for the concepts being discussed. Again, the objection was overruled, although the trial judge urged Appellant to "move on." Tr. at 54, l. 24, to 55, l. 3.

With respect to the prosecutor's first two objections, then, not only was there a complete lack of effort by Appellant to preserve the issue, there was no issue to preserve. Appellant stated without hesitation that the purpose of this line of questioning was to explore the officer's credentials. Furthermore, both of the prosecutor's objections were overruled.

---

[3] Because of the lack of citations to the record and the cursory nature of the Brief of Appellant, essentially *all* of Appellee's subsequent arguments and references are offered *arguendo*.

This line of cross-examination drew two more objections from the prosecutor during the following exchange:

> ATD [to Officer Olsen]: But you're familiar with the police concept that it is important not to let there be broken windows in an area, correct?
>
> A: Um, well, yes but that's you're taking something out of context that you're quoting from the book.
>
> Q: Ok, my understanding of this book, and tell me if I'm wrong, is that it's based on a study where they left, I believe it was a car in kind of a bad neighborhood to see how long it would take for…
>
> ATP: You Honor, I'm going to object to the…
>
> JUDGE: Sustain the objection.
>
> ATD: Ok, alright. Um, with regard to this broken window concept, can you explain that, please for the jury?
>
> ATP: Your Honor, I'm going to object again, we need some foundation so that he's even familiar to these concepts…
>
> ATD: He's already testified that he is familiar with it your honor.
>
> JUDGE: Come up here (inaudible conversation).

Tr. at 55, ll. 4–18.

The only sustained objection during this exchange was incomplete and, therefore, with respect to the record, unformed. Appellant requested no clarification as to the grounds for the objection and made no proffer as to the anticipated content or relevance of the question. As to the final foundational objection, no ruling was ever handed down. Instead, the judge initiated a sidebar discussion with both counsel. Tr. at 55, l. 18. Following the sidebar discussion, Appellant pursued an unrelated line of cross-

examination. Appellant did not request a ruling on the last objection, make a proffer, or otherwise address the court to preserve any issue related to this line of cross-examination.

Without such a proffer, there is no way for this Court to determine whether or not the evidence was appropriately excluded, or whether or not the exclusion would have affected the verdict. The Utah Supreme Court "has previously noted that 'we will not set aside a verdict because of the erroneous exclusion of evidence unless a proffer of evidence appears of record, and we believe that the excluded evidence would probably have had a substantial influence in bringing about a different verdict.'" (*State v. Arguelles*, 921 P.2d 439, 445 (Utah 1996), quoting *State v. Rammel* 721 P.2d 498, 499–500 (Utah 1986). See also *Hill v. Hartog*, 658 P.2d 1206, 1209 (Utah 1983).)

The only other objection that might relate to the Point I argument (again, not cited in the Brief of Appellant) occurred during the direct examination of defense witness Michael Balliet. *See, generally*, Tr. at 59, l. 5, to 61, l. 5. Mr. Balliet's testimony consisted of broad complaints about "a lot of kids from the school and other people[.]" Tr. at 59, l. 25. No part of his testimony connected these generic complaints or the "people" they involved to the participants or events of the case at hand. Referring to these generalized complaints, Appellant asked, "Now … when you spoke to Officer Olsen, what was his advice?" Tr. at 60, ll. 18–20. This drew the following objection from the prosecutor:

> Your Honor, I think this is getting back on that same track and I'm going to object on the grounds of irrelevance and, um, I have some real concerns about, uh, this kind of generalized gripe [type?] of testimony unless it's going to be tied into this case somehow.

Tr. at 60, ll. 21–24. Appellant responded only to say, "Goes to the Defendant's state of mind, Your Honor." Tr. at 60, l. 25.

This response does not preserve the issue raised in Appellant's Point I argument. No proffer clarified how the excluded testimony could have any relevance to Appellant's state of mind in the matter before the court. The context of this objection makes such a proffer particularly important. The objection called into question the relevance of *Officer Olsen's advice to Michael Balliet* concerning *Mr. Balliet's* complaints about "a lot of kids from the school and other people" in his neighborhood. Tr. at 59, l. 25. Mr. Balliet was a neighbor of the defendant who was not a witness to the charged offense. No testimony had provided (or would provide at any point in the trial) any connection between Mr. Balliet and the incident before the court. No testimony had provided (or would provide at any point in the trial) any connection between the "kids" and "people" of Mr. Balliet's complaints and the 14-year-old victim or any of the witnesses. Without a proffer there is simply no way for this Court to evaluate whether the excluded evidence might have affected the jury's verdict.

Because Appellant failed to adequately preserve any issue relating to the "level of police protection," this Court should decline to address the merits of Point I of the Brief of Appellant.

Point II was not preserved: the mere suggestion of a sentencing alternative does not preserve an issue for appeal

Appellant also failed to preserve the issue raised in Point II of the Brief of Appellant. Appellee contends, *infra* in part IV of this brief, that Appellant's attempt to insert the Americans with Disabilities Act into this matter is wholly inappropriate. Due to Appellant's failure to preserve the issue at sentencing, however, this Court should not reach the merits of the misguided argument.

Appellant summarizes Point II of his argument as follows: "The trial court erred in sentencing Mr. Woitock to jail once evidence was proffered that the jail is out of compliance with the Americans with Disabilities Act to a degree that disabled inmates have been injured." Br. of Appellant at 10. However, there was no evidence presented at the sentencing in this matter, proffered or otherwise. Appellant made only one brief statement in response to the trial court's imposition of jail, as follows:

> Your Honor, um, with regard to the jail, to the jail sentence if, you can see Mr. Woitock is disabled, it's my understanding that the metro jail isn't in compliance with the Americans With Disabilities Act and in fact, I am aware of persons, um, with disabilities who become very badly injured while in jail, so I would ask that you, um allow Mr. Woitock to do community service in lieu of jail.

Sentencing Transcript, hereinafter "Sentencing Tr.," at 4, l. 19, to 5, l. 2.

This statement is a suggestion, not evidence. Nor does the statement rise to the level of a proffer of evidence. While the Rules of Evidence do not apply in sentencing proceedings, (*see* Utah R. Evid. 1101(b)(3)), this does not mean, of course, that all statements of attorneys or defendants are "evidence" at such proceedings. Usually, as in

this case, such statements are simply entreaties to the sympathy of the judge, through which defendants hope to win a more favorable sentence. Because no other evidence was offered or proffered, then, Appellant's assertion that the jail sentence was handed down in spite of certain evidence is inaccurate.

Just as an attorney's or defendant's statements alone do not qualify as evidence, such statements do not automatically preserve issues for appeal. When the judge declined to follow Appellant's suggestion as to community service,[4] Appellant did not object or otherwise take exception to the sentence or its imposition. No request was made for a stay pending a hearing on the jail's compliance with the ADA or pending appeal.

The Utah Supreme Court reviewed an analogous situation in *State v. Bywater*, 748 P.2d 568 (Utah 1987). At sentencing in that case, the defendant "offered no evidence of the existence of any mitigating circumstances[,]" (*Id.* at 568), which might have supported his argument and (had he then preserved the issue) his appeal. The defendant argued for reduction in the level of offense and against imposition of a minimum

---

[4] This decision was not so flippant or callous as Appellant's phrasing intimates. Presiding at both the jury trial and at sentencing, the judge had the opportunity to observe the defendant and hear the defendant's description of his disabilities (testimony unsupported by other evidence at trial or at sentencing). The judge also heard testimony from the defendant that could be interpreted as contradicting his alleged physical disabilities, such as testimony that he had walked down from his second floor apartment to confront people outside. The judge had observed Appellant in court and had watched his own demonstration of how he twisted around to explain how the victim was hit in the back of the head. Tr. at 69, ll. 5–11. Further, the trial judge had heard testimony from third party witnesses that the defendant was not using his cane to walk when he confronted the eventual victim, but was instead "waving it around[,]" (Tr. at 33, l. 3), while "yelling, 'Who should I cane first?'" Tr. at 39, ll. 4–5.

mandatory sentence. The State argued for maximum incarceration. When the trial court sentenced the defendant to ten years' imprisonment, defense counsel's only remark was, "Very well." *Id.* at 569.

Reviewing this case history, the Utah Supreme Court held as follows:

> It is thus clear from the record that defendant *accepted without challenge* the reasons stated by the trial court for imposing the sentence of a term of middle severity. The issue not having been raised in the trial court, the longstanding rule of appellate review precludes the issue from being raised for the first time on appeal.

Id., emphasis added. The same reasoning applies in this matter. Appellant accepted the sentencing judge's final order without challenge. Therefore Appellant should be precluded from raising the issue for the first time in this appeal.

III. ARGUMENTS SPECIFIC TO APPELLANT'S POINT I

The evidence was properly excluded as irrelevant

As previously stated, Appellant does not direct us with any specificity to the points of alleged evidentiary exclusion in the record. However, the six sentences of Appellant's Point I argument, and the included statutory definition of "relevant evidence," suggest that Appellant's position is that desired testimony was excluded on the basis of relevance. Only two sections in the record reflect possible evidentiary exclusion; therefore, this discussion revolves around those two sections. (Both sections were discussed *supra* in part II of this brief, as it is Appellee's contention that Appellant's Point I was not preserved for appeal. The following arguments are offered *arguendo*.)

Appellant asserts that he "sought to establish that current police philosophy is to prevent and punish acts of vandalism because once vandalism occurs in a neighborhood, it acts as a precursor to more serious crimes." Br. of Appellant at 10–11. Without the benefit of specific citations to the record, Appellee must make its own assumptions as to *when* Appellant sought to do this during the trial. Appellee assumes here that Appellant sought to establish current police philosophy through his cross-examination of Officer Olsen on the subject of "community based policing."[5] Tr. at 53, l. 21, to 54, l. 9. According to Appellant, this evidence, when coupled with "evidence that Appellant had not received the standard of care that police try to provide[,] was relevant to show that Appellant's use of force was reasonable." Br. of Appellant at 10.

Appellant failed to lay the necessary foundation to establish the relevancy of community-based policing. The "party offering the evidence must lay a sufficient foundation to show the evidence is relevant." *State v. Stewart*, 925 P.2d 598, 600 (Utah Ct. App. 1996). To lay such a foundation, Appellant would have needed to produce testimony that the Defendant/Appellant, not Officer Olsen, was familiar with the concepts of community-based policing. A police officer's familiarity with a theory of law enforcement cannot show someone else's state of mind at a certain time and situation. Such testimony could not have made "the existence of any fact that is of consequence to the determination of the action more probable or less probable…" Utah R. Evid. 401.

---

[5] The cross examination of Officer Olsen on this subject, and the subsequent the objections and responses were summarized on pages 13–16 in part II of this brief.

In *State v. Stewart*, *supra*, this Court held that the defendant had failed to meet a two-step foundation to establish relevance. A similar two-step foundation would have been appropriate in this instance. *Stewart*, 925 P.2d at 601–603. First, foundation was needed to show that Appellant's personal knowledge of the theory of community-based policing affected Appellant's state of mind. This effect would then need to be tied to Appellant's state of mind at the time of the offense, with a showing that his state of mind was related "in any meaningful way" to the offense. *Id.* at 602.

In addition, the allegedly excluded testimony would certainly fall within the purview of the trial judge's "broad discretion," (*State v. Harrison*, 805 P.2d 769, 780 (Utah Ct. App. 1991) cert. denied, 817 P.2d 327 (Utah 1991)), in determining whether evidence is relevant. *See also*, *Bambrough v. Bethers*, 552 P.2d 1286, 1290 (Utah 1976). "Irrelevant evidence is inadmissible under rule 402 of the Utah Rules of Evidence." *Jaeger*, 360 Utah Adv. Rep. at 4. Point I of the Brief of Appellant is based on a proposed nexus between the level of police protection and Appellant's state of mind in committing a specific act of violence against a 14-year-old boy. Even if Appellant had laid additional foundation on the subject of community-based policing (calling, perhaps, an expert witness rather than relying on a patrol officer), the theories behind community-based policing are so removed from Appellant's intimated trial strategy as to fall within the trial judge's discretion to designate them irrelevant. (An appellate court "will find

error in a relevancy ruling only if the trial court has abused its discretion." *Harrison*, 805 P.2d at 780.)

As discussed in part II of this brief, *supra*, the record reflects only one other objection on the grounds of relevance. This occurred during Appellant's direct examination of witness Michael Balliet, who complained broadly about "a lot of kids from the school and other people[.]" Tr. at 59, l. 25. During this examination, Appellant asked Mr. Balliet, "Now … when you spoke to Officer Olsen, what was his advice?" Tr. at 60, ll. 18–20. The prosecutor objected on the grounds of relevance. The objection was sustained over the defense's sweeping, unelaborated assertion that a response would somehow go to Appellant's "state of mind." Tr. at 60, l. 25. This is the sole, fully formed objection of record dealing specifically with relevance that was sustained by the trial court. Tr. at 60, l. 25. It is important to emphasize yet again that the testimony prevented by this objection was *Officer Olsen's advice to Michael Balliet* concerning the latter's generalized complaints. No objection was raised to Michael Balliet's other testimony on the subject, (Tr., p. 59, l. 22–p. 60, l. 17), no objection was raised to Appellant's testimony about his own prior experiences or concerns, (Tr. at 63, ll. 2–20), and no objection was raised to Appellant's closing argument about Appellant's state of mind relating to the incident, (Tr., p. 91, ll. 11–p. 93, l. 17; p. 94, ll. 24–26). Appellant was not prevented from developing any defense.

Again, Michael Balliet was not a witness to the incident before the jury. No testimony or other evidence was introduced or proffered to indicate that Michael Balliet

knew anything about the incident. No testimony or other evidence was introduced or proffered to suggest how, even in an abstract sense, Officer Olsen's advice to Michael Balliet might have affected the defendant's state of mind or any other aspect of the proceedings. No testimony or other evidence was introduced or proffered to suggest a nexus between any such effect and the subject matter of the trial.

Appellant, therefore, failed to lay the necessary foundation to establish relevance of Officer Olsen's advice to Michael Balliet. And, again, the matter as presented (without supporting proffers or other evidence) would certainly fall within the trial court's broad discretion in determining relevance.

Even if relevant, the evidence was properly excluded

Rule 403 of the Utah Rules of Evidence provides that even relevant evidence can be excluded under certain circumstances.

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Utah R. Evid. 403. It is appropriate for this Court to consider Rule 403 in this instance, even though the exception was not raised below. Because Appellant made no proffers and offered no argument to preserve the issues raised in the Brief of Appellant, there was no context for the trial court to specify its rationales for exclusion. Nor was there an opportunity (or need) for the prosecutor to offer Rule 403 as a cause for exclusion.

Because of the lack of specificity in the Brief of Appellant, Appellee has made assumptions about which parts of the record apply to Appellant's Point I arguments. *See* part II of this brief, *supra*. The points of record discussed pursuant to those assumptions were so inapposite to the trial issues as to cry out for the kind of policy analysis anticipated by Rule 403. *See Jaeger*, 360 Utah Adv. Rep. at 4. Introducing the introduction of the concept of community-based policing through Officer Olsen could have served only to confuse the issues and mislead the jury. Any nexus between law enforcement theory and Appellant's state of mind at the time of the offense was so abstract that even the Brief of Appellant fails to clarify exactly what testimony was desired and why.

The same problems apply to the testimony of Michael Balliet concerning Officer Olsen's advice. Balliet's testimony on that single point was not admitted and there was no proffer, therefore there is no record to indicate what the jury might have heard as his response. But the intimation in the Brief of Appellant is that the level of police protection was unsatisfactory. Such testimony (particularly from a person who did not witness and had nothing to do with the case being tried) could *only* be offered as a prejudicial indictment of the police, distracting the jury from the true issues of fact. At a minimum, the dangers of unfair prejudice, confusion of the issues, and misleading the jury would have substantially outweighed the probative value of testimony that was so remote from any fact of consequence. What other theories of law enforcement, one might ask, have been imperfectly applied by the local police, and why would they have anything to do

with this case? As a matter of policy, trial courts must not be required to allow the introduction of abstract concepts and unrelated indictments of the police to distract jurors from the true issues. In the potential for confusion and prejudice, such a practice goes beyond the usual defense tactics known as "red herrings" or "smoke and mirrors."

If the exclusion of evidence regarding the level of police protection was erroneous, the error was harmless

Appellant has not met his burden of establishing that the alleged error in excluding evidence of the level of police protection would have affected the verdict. *See First Gen. Servs. v. Perkins*, 918 P.2d 480, 485 (Utah Ct. App. 1996). "'[E]ven if we were to conclude that the evidence here was improperly admitted, that would not decide the issue. We still would have to determine whether the error was harmful.'" *Id.*, quoting *State v. Hamilton*, 827 P.2d 232, 240 (Utah 1992). In the present case, exclusion of evidence concerning the level of police protection—even if found to be relevant—was harmless error.

Appellant alleges that additional testimony on this subject "would have supported his contention that he reasonably believed that he needed to use force against Mr. Headman's use of force." But there was no evidence of imminent (or even intimated) use of force by the 14-year-old Mr. Headman at any point in the trial.

In any event, the cumulative evidence against the Appellant was such that the jury would have certainly rendered the same decision even if further testimony about the

theory of community-based policing or the level of police protection had been offered or admitted.

> We will not overturn the trial court's decision regarding admissibility of evidence unless it was an abuse of discretion. ... Moreover, even if the court erred in admitting the challenged evidence, "we will only reverse if this error was harmful, 'i.e., if absent the error there is a reasonable likelihood of an outcome more favorable to the defendant.'"

State v. Blubaugh, 904 P.2d 688, 699 (Utah Ct. App. 1995) quoting *State v. White*, 880 P.2d 18, 21 (Utah Ct. App. 1994) (in turn quoting *State v. Dunn*, 850 P.2d 1201, 1221 (Utah 1993)).

The jury had the opportunity to assess the credibility of the victim, the two eyewitnesses, and the investigating police officer. Officer Olsen's testimony indicated that Appellant denied owning a cane anymore at all, (Tr. at 46, l. 8), and then claimed that he didn't know anything about the assault (Tr. at 47, ll. 5–6). Officer Olsen testified that Appellant then admitted striking the boy, but blamed his conduct on a fear that the victim was releasing asbestos from the condemned building by throwing rocks at it. Tr. at 47, ll. 17–19. The jury later had the opportunity to assess Appellant's credibility and to compare his altered story to earlier testimony. Tr., p. 61, l. 15–p. 72, l. 13.

Considering the remote, abstract nexus between the kind of testimony at issue and the distinctly fact-based nature of the trial, there is no "reasonable likelihood of an outcome more favorable to the defendant" in the present matter. *Blubaugh*, 904 P.2d at 699. The exclusions of evidence—if found to have been in error—were harmless.

IV. ARGUMENTS SPECIFIC TO APPELLANT'S POINT II

Point II of the Brief of Appellant does not put Appellee on notice as to how the Americans with Disabilities Act applies to the trial court's power to sentence a convicted criminal defendant to jail pursuant to statute. Because of the burdensome nature of trying to explore the ADA to develop Appellant's argument for him, only a response in the most general terms is merited here.

Appellant establishes that the ADA applies to correctional facilities. The ADA, however, does not provide that persons with disabilities[6] cannot be sentenced to jail. Instead, the ADA provides remedies for individuals who are "subjected to discrimination by any such [public] entity." (42 U.S.C. § 12102 (2).) If the Appellant believes that he was the victim of discrimination under the ADA, then, his remedy is restricted to following the filing and notice provisions of that act.

The ADA, then, is not a determining factor here. But let us address, *arguendo*, the concept of the alleged unlawful sentencing without application of the Act. In that regard, Appellant did not provide sufficient information, in the form of evidence or a proffer, for the trial judge to alter her final decision in any way.

The trial judge could only assess Appellant's disabilities based on the evidence that was before the court. What evidence there was came only from Appellant's own testimony. (The trial judge had also had the opportunity to assess Appellant's credibility.)

No additional evidence was provided. Instead, Appellant offered—not as evidence or as a proffer[7]—a short, final suggestion of a sentencing alternative. Sentencing Tr., p. 4, l. 19–p. 5, l. 2.

The lack of evidence that might have supported Appellant's suggestion at sentencing is not due to a lack of opportunity or options. Appellant was represented by counsel in this matter and a full month passed between trial and sentencing. If Appellant believed that his health would be at risk in the Salt Lake County Metro Jail, he could have offered evidence of his disabilities and of the alleged jail inadequacies at the sentencing proceeding. He could have notified the Sheriff's Office of his concerns so that that office could be represented at the sentencing. He could have explained how he could perform community service while simultaneously being unable to reside in the jail. (It is without explanation or citation to the record that Appellant declares, "[t]he trial court should have sentenced Mr. Woitock to performing community service in lieu of jail, given his ability to perform such service and the evidence showing that Mr. Woitock was disabled..." (Br. of Appellant at 13.) He could have looked for and suggested other facilities that were more appropriate for his condition. He could have presented evidence and or an argument that home confinement or an ankle monitor would be appropriate.

---

[6] Because of the nature of the proceedings (i.e., a criminal misdemeanor case as opposed to a civil suit based on the ADA), no findings of fact are before this Court to support the assertion that Appellant's disabilities fall within the definitions of the ADA.

[7] With respect to Appellant's assertions regarding "proffered evidence regarding the jail's lack of access for disabled inmates," (Br. of Appellant, p. 12), it is Appellee's contention

Against the lack of information before the trial court were aggravating factors that could reasonably merit 10 days' jail even on a first criminal offense. Appellant had been found guilty by the jury of hitting an unarmed 14-year-old boy, who was walking away from Appellant at the time, on the back of the head with a cane. Tr. at 22, ll. 22–23. The force of the blow was sufficient to cause blurred vision, nausea, and dizziness. Tr. at 22, l. 25; 23, l. 24. At no point during the trial did Appellant express regret for his actions or acknowledge the inappropriateness of his conduct. Tr. at 61, l. 16, to 72, l. 17. Even at sentencing the Appellant expressed no such regret or acknowledgement. His only expressed concern was over the prosecutor's request that he have no contact with West High students, his concern apparently being that they would continue to "trespass in the area of his apartment." Sentencing Tr. at 3, ll. 10–15.

Given the information that was before the trial court at the time of sentencing, therefore, the imposition of ten days' incarceration at the Salt Lake County Metro Jail was lawful and arguably appropriate.

CONCLUSION

The Brief of Appellant was inadequately briefed, and therefore this Court should not reach the merits of either point raised by Defendant/Appellant. The arguments are, in fact, so cursory (with little or no applicable legal analysis), and the issues are so ill-defined, that this matter should not be set for oral argument. Also this Court should not reach the

---

that no such evidence was in fact proffered. Please refer to pp. 17–19 of this brief, *supra*, for elaboration.

merits of either point raised in the Brief of Appellant because those points were not preserved at the trial court level.

Appellant failed to lay a sufficient foundation to establish relevance with respect to his Point I issues, and the relevance of those matters would appropriately fall within the trial court's broad discretion in determining relevance. Even if relevant, the dangers of unfair prejudice, confusion of the issues, and misleading the jury would have substantially outweighed any probative value of the excluded evidence. Furthermore, even if found to be erroneously excluded, the error was harmless as there is no reasonable likelihood that the jury would have arrived at a different verdict absent the exclusion. With respect to Appellant's Point II, the Americans with Disabilities Act provides remedies to the victims of discrimination, but it does not apply to this case as suggested by Appellant. In any event, there was not sufficient information before the judge to merit an alternative sentence.

Therefore, this Court should affirm both the conviction and the sentence.

RESPECTFULLY SUBMITTED this 10th day of August, 1999.

T. LANGDON FISHER (SB #5694)
Associate City Prosecutor
Attorney for Plaintiff/Appellee

ADDENDUM

Procedural and evidentiary rules cited in this brief

Utah Rules of Appellate Procedure

Rule 24. Briefs.

(a) Brief of the appellant. The brief of the appellant shall contain under appropriate headings and in the order indicated:

(9) An argument. The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on.

d) References in briefs to parties. Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee." It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of parties, or descriptive terms such as "the employee," "the injured person,' "the taxpayer," etc.

(e) References in briefs to the record. References shall be made to the pages of the original record as paginated pursuant to Rule 11(b) or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to Rule 11(f) or 11(g). References to pages of published depositions or transcripts shall identify the sequential number of the cover page of each volume as marked by the clerk on the bottom right corner and each separately numbered page(s) referred to within the deposition or transcript as marked by the transcriber. References to exhibits shall be made to the exhibit numbers. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the record at which the evidence was identified, offered, and received or rejected.

Utah Rules of Evidence

Rule 401. Definition of "relevant evidence."
"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible.
All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or the Constitution of the state of Utah, statute, or by these rules, or by other rules applicable in courts of this state. Evidence which is not relevant is not admissible.

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.
Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

CERTIFICATE OF DELIVERY

I hereby certify that I caused to be mailed or delivered a true and correct copy of the foregoing Brief of the Appellant on this 10th day of August, 1999 to:

ANDREA J. GARLAND
Attorney for Defendant / Appellee
SALT LAKE LEGAL DEFENDER ASSOCIATION
424 East 500 South, Suite 100
Salt Lake City, Utah 84111
(801) 532-5444